



1 **FURTHER APPEARANCES:**

2 **FOR THE DEFENDANT:**

3 **KECKER & VAN NEST LLP**

4 633 BATTERY STREET

5 SAN FRANCISCO, CALIFORNIA 94111-1809

6 **BY: ROBERT A. VAN NEST, ESQUIRE**

7 **MICHAEL S. KWUN, ESQUIRE**

8 **REID P. MULLEN, ESQUIRE**

9 **CHRISTA MARTINE ANDERSON, ATTORNEY AT LAW**

11 **RENNY HWANG, ESQUIRE**

12 GOOGLE INC.

13 1600 AMPHITHEATRE PARKWAY

14 MOUNTAINVIEW PARKWAY, CALIFORNIA 94043

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1 AUGUST 23, 2012

8:20 O'CLOCK A.M.

## 3 P R O C E E D I N G S

4 THE COURT: LET'S GO TO ORACLE V. GOOGLE.

5 MR. JACOBS: GOOD MORNING, YOUR HONOR. MICHAEL  
6 JACOBS FROM MORRISON & FOERSTER FOR ORACLE.7 WITH ME IS KEN KUWAYTI, DAN MUINO, ROMAN A. SWOOPES, AND  
8 ANDREW TEMKIN FROM ORACLE.

9 THE COURT: WELCOME.

10 MR. VAN NEST: GOOD MORNING, YOUR HONOR. BOB VAN  
11 NEST, KEKER & VAN NEST FOR GOOGLE. I'M HERE WITH MS. ANDERSON,  
12 MR. KWUN, MR. MULLEN AND WITH RENNY HWANG FROM GOOGLE?13 THE COURT: WELCOME BACK. THIS IS A MOTION FOR  
14 JUDGMENT AS A MATTER OF LAW BROUGHT BY GOOGLE.

15 WHO IS GOING TO ARGUE THIS?

16 MR. VAN NEST: GOOD MORNING, YOUR HONOR. VERY  
17 BRIEFLY, THIS MOTION CONCERNS THE NINE LINES OF CODE THAT WAS  
18 DISCUSSED EXTENSIVELY DURING THE TRIAL. IT ADDRESSES QUESTION  
19 3A ON THE VERDICT FORM.20 YOUR HONOR INSTRUCTED THE JURY THAT THEY COULD CONSIDER  
21 THE WORK AS A WHOLE TO BE THE TIMSORT FILE IN WHICH THE  
22 RANGECHECK METHOD WAS FOUND. AND WE ARGUED BOTH IN CONNECTION  
23 WITH OUR EARLIER MOTION AND WITH JURY INSTRUCTIONS AND WITH THE  
24 VERDICT FORM THAT THAT WAS NOT CORRECT. THAT WORK AS A WHOLE  
25 WAS THE ENTIRE J2SE PLATFORM, BE IT 1.4 OR 5.0.

1           WE ARGUED SECONDLY THAT THE RANGECHECK METHOD WAS DE  
2 MINIMUS AS A MATTER OF LAW IN THAT IT WAS ONLY NINE LINES OF  
3 CODE. WHETHER YOU VIEW THAT AS NINE OUT OF 3,000, WHICH WAS THE  
4 TIMSORT FILE, OR YOU VIEW IT AS NINE OUT OF SEVERAL MILLION,  
5 WHICH WAS THE J2SE PLATFORM, IT'S DE MINIMIS AS A MATTER OF  
6 LAW.

7           AND I THINK YOUR HONOR NOTED IN DISCUSSING THE DAMAGES  
8 FEATURES OF THIS THAT THIS WAS CODE THAT ANYONE COULD WRITE, A  
9 HIGH SCHOOL PROGRAMMER COULD WRITE. IT COULD BE WRITTEN IN A  
10 SHORT PERIOD OF TIME.

11           WE HAVE ARGUED THIS TWICE. YOUR HONOR HAS RULED FOR ORACLE  
12 BOTH TIMES. I HONESTLY DON'T THINK THERE'S ANYTHING NEW IN THE  
13 BRIEFS THAT WE DIDN'T PRESENT BEFORE, SO I WOULD SUBMIT IT ON  
14 THE PAPERS, AND OUR PRIOR ARGUMENTS AND DISCUSSION WITH YOUR  
15 HONOR.

16           **THE COURT:** THANK YOU FOR YOUR BREVITY.

17           ORACLE.

18           **MR. JACOBS:** MR. KUWAYTI WILL ARGUE THIS YOUR HONOR.

19           **THE COURT:** MR. KUWAYTI.

20           **MR. KUWAYTI:** GOOD MORNING, YOUR HONOR.

21           **THE COURT:** GOOD MORNING.

22           **MR. KUWAYTI:** I THINK I HAVE NO CHOICE BUT TO BE AS  
23 BRIEF AS GOOGLE'S COUNSEL GIVEN YOUR COMMENTS. I THINK THIS IS  
24 AN ARGUMENT THAT YOUR HONOR HAS CONSIDERED BEFORE. THE PRIMARY  
25 ARGUMENT GOOGLE MAKES IS THAT BECAUSE THE WORK WAS REGISTERED,

1 THE PLATFORM J2SE 5.0 AND THE PRIOR VERSION WAS REGISTERED WITH  
2 THE COPYRIGHT OFFICE, THAT THAT HAS TO BE THE WORK FOR THE  
3 PURPOSES OF DETERMINING THE WORK AS A WHOLE. THE COPYRIGHT  
4 REGULATIONS DON'T SAY THAT.

5 TO THE CONTRARY, THEY SAY THAT YOU CAN REGISTER. YOU HAVE  
6 COPYRIGHTABLE ELEMENTS THAT THEMSELVES CONSTITUTE  
7 SELF-CONTAINED WORKS. THEY CAN BE REGISTERED AS A SINGLE WORK  
8 WHEN THEY ARE COMBINED IN ONE UNIT OF PUBLICATION. THAT'S WHAT  
9 HAPPENED HERE.

10 I THINK ANYTHING TO THE CONTRARY WOULD BE AN  
11 ADMINISTRATIVE NIGHTMARE. IT WOULD REQUIRE CLAIMANTS TO  
12 REGISTER EVERY SINGLE FILE OF COMPUTER CODE THAT THEY ARE  
13 SUBMITTING WITH THEIR PROGRAM.

14 THE COPYRIGHT OFFICE DOESN'T WANT THAT, DOESN'T REQUIRE  
15 THAT. AND I THINK THE CASE LAW THAT WE'VE CITED, PARTICULARLY  
16 THE HUSTLER CASE, BEARS THAT OUT.

17 I THINK THE OTHER ISSUE HERE IS THAT IF THERE WERE A RULE  
18 TO THE CONTRARY THAT WOULD MEAN THAT A PLAGIARIST COULD SIMPLY  
19 COPY FILES AT WILL OUT OF A COMPUTER PROGRAM THAT'S VERY LONG,  
20 AND THEN MAKE THE ARGUMENT THAT:

21 "THERE'S 15 MILLION LINES OF CODE, OR 2 MILLION LINES  
22 OF CODE, AND WE ONLY COPIED NINE FILES," AS IS THE CASE  
23 HERE.

24 THE NEWTON VERSUS DIAMOND CASE WHICH BOTH PARTIES HAVE  
25 CITED TALKS ABOUT THE POLICY BEHIND THE DE MINIMIS RULE BEING

1 THAT COPYRIGHT INFRINGEMENT SHOULD ONLY BE INFRINGEMENT IF  
2 THERE'S COPYING TO AN UNFAIR EXTENT.

3 THIS MOTION WAS ADDRESSED NOT JUST TO RANGECHECK, BUT TO  
4 THE EIGHT DECOMPILED FILES.

5 I SUBMIT TO YOUR HONOR THAT A RULE THAT SAYS INTENTIONALLY  
6 DECOMPILING FILES AND COPYING THEM IS NOT COPYRIGHT  
7 INFRINGEMENT IN THE FIRST INSTANCE IS THE WRONG RULE. IT MAY BE  
8 THAT THERE ARE VERY LITTLE DAMAGES ASSOCIATED WITH THAT  
9 INFRINGEMENT. IT MAY BE THAT IT'S USED IN A CONTEXT THAT  
10 JUSTIFIES A FINDING OF FAIR USE. AND THERE'S NO SUCH CLAIM  
11 HERE. BUT TO HOLD THAT SOMEBODY CAN SIMPLY DO THAT, AND THAT  
12 IT'S NOT EVEN COPYRIGHT INFRINGEMENT AT ALL I THINK IS THE  
13 WRONG ARGUMENT.

14 AND THE LAST THING THAT I'D SAY IS THAT WHETHER THE COURT  
15 APPLIES WHAT WE THINK IS THE PROPER LENS, WHAT YOUR HONOR HAS  
16 HELD IS THE PROPER LENS OF COMPARING IT TO THE INDIVIDUAL FILE,  
17 OR THAT YOU COMPARE IT TO THE LINES OF CODE AS A WHOLE, THE  
18 STANDARD IS IT IS ONLY DE MINIMIS IF IT'S -- IF THE USE IS SO  
19 MEAGER, THE COPYING SO IS MEAGER AND FRAGMENTARY THAT AN  
20 AUDIENCE WOULDN'T RECOGNIZE THE COPYING.

21 IN THIS CASE IN EITHER INSTANCE THE AUDIENCE, WHICH THE  
22 PARTIES AGREE IS PROGRAMMERS, PEOPLE WHO CAN READ THE CODE,  
23 WOULD RECOGNIZE THAT COPYING TOOK PLACE.

24 AND THERE IS AMPLE EVIDENCE IN THE RECORD WITH RESPECT TO  
25 RANGECHECK AND WITH RESPECT TO THE EIGHT DECOMPILED FILES TO

1 SUPPORT THE JURY'S FINDING ON RANGECHECK AND TO SUPPORT THE  
2 JUDGE'S -- YOUR RULING ON JMOL.

3 **THE COURT:** ALL RIGHT. THANK YOU.

4 **MR. KUWAYTI:** THANK YOU.

5 **THE COURT:** SUBMITTED?

6 **MR. VAN NEST:** YES, YOUR HONOR.

7 **THE COURT:** OKAY. IS THAT ALL THAT WE HAVE TODAY?

8 **MR. VAN NEST:** I BELIEVE SO.

9 **THE COURT:** ALL RIGHT. THANK YOU VERY MUCH. IT'S  
10 UNDER SUBMISSION.

11 **MR. JACOBS:** THANK YOU, YOUR HONOR.

12 (THEREUPON, THIS HEARING WAS CONCLUDED.)

13 STENOGRAPHY CERTIFICATION

14 "I CERTIFY THAT THE FOREGOING IS A CORRECT TRANSCRIPT  
15 FROM THE RECORD OF PROCEEDINGS IN THE ABOVE-ENTITLED MATTER."  
*KATHERINE WYATT*

16 10-19-12  
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